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Settlement of the Bank Claims

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Soia Mentschikoff: Could I ask Bob Mundheim about the private bank negotiations? How much discussion was there about what constitutes a loan, for example, by the banks? Any bank loan? In other words, by the time you got to London, how much had been settled on that? How much still had to be resolved in London?

Robert Mundheim: That question was settled in the negotiations with regard to what specific things would be covered. It had been largely done before this last minute intervention on my part. But, certainly it was clear that the $3.667 billion would be used to pay off the syndicated loans. I do not think there was a great deal of discussion as to what would be included in the syndicated loans. Then it was also recognized that there might be disputes as to which non-syndicated loans the Iranians would accept as really being properly due and owing. That is why the amount to cover payment of those loans was in escrow; so that those disputes could be negotiated between the Iranians and the individual banks, or if not settled by negotiation, settled by arbitration.

Soia Mentschikoff: But by that time they had restricted themselves to loans and not to liquidated debt, which is different from loans?

Robert Mundheim: As far as I know, they were talking about bank debts.

Soia Mentschikoff: And that set of conversations, as I understand it, was a set of conversations between lawyers representing banks—the American banks and German, French, and Iranian banks. Was there any government representation there? Who represented the United States?

Robert Mundheim: Do you mean in the discussions that Hoffman had? Those were private discussions in which the participants met lawyer-to-lawyer. They were talking about settling litigation involving private parties. The Government wasn't involved in the lawsuits as such. Obviously, however, the declarations were the subject of government-to-government decisions.

Hans Smit: Yes, but a precondition, even in the private negotiations, was the hostages' release.

Robert Mundheim: That is correct.

Hans Smit: And that, of course, was not a particular concern of the banks.

Robert Mundheim: No. But the banks recognized that in order for them to work out a settlement they had to have the cooperation of the Government. The banks couldn't say to Iran, "We will give you your money back," so long as the Government said they could not. To that extent they recognized they would have to bring the Government along.

Soia Mentschikoff: Let me ask you a slightly different question. As I understand it from what you're saying, the Government simply accepted the settlements reached by the banks regarding what would and would not be paid. The Government just gave that settlement its seal of approval?

Robert Mundheim: I don't know the answer to that. While I knew about the discussions that the bank lawyers had with the Iranian lawyers, I had left Government by the time the ultimate agreements were negotiated, so I do not know what the discussions inside the Government were, or how the discussions with the Iranians, through the intermediation of the Algerians, went.

Soia Mentschikoff: Do you know, Mark?

Mark Feldman: Yes, but I don't know all; I was not involved in all the discussions. I know that considerable thought was given to these questions by the Treasury. I participated in several discussions with senior officials at Treasury, and they must have had lengthy discussions with the banks. On the Government side, we did review the options for the $3.7 billion, and concluded there was no option more equitable than paying off the syndicated loans. That was accepted by the banks, or perhaps they had come to the same conclusion on their own.

Soia Mentschikoff: That is not my question. My question relates to the original settlement discussions among the lawyers which produced a set of principles. If that is what they did, obviously they had also discussed some of the details. One of the details was that the syndicated loans would be paid off first.

Mark Feldman: No, I am telling you the opposite. I do not know the details. I was not fully privy to the bank negotiations. But, in the end, the Iranian proposal became the basis of the agreement.

Robert Mundheim: I think, Mark, the question basically relates to the original notion that liquidated debts would be treated differently than unliquidated debts, and that, ultimately, liquidated debts became translated into bank loans. The question is, "Were there other liquidated debts that could have been treated like the bank loans?" I take it that is the question on the table, and I (1) do not know whether

there were, or (2) what kind of consideration was given to the possibility.

Hans Smit: That gets back to my question. At the time the banks were settling part of the question, did it not occur to the Government that there were other creditors who had claims competing with those of the banks, and that, in fairness, some approach should be taken that would represent the interests of all the claimants?

Robert Mundheim: The answer is yes. Indeed, the Government gave it consideration; thought about how it could be done. You had a question of what could you do and do rapidly. Now, again, I do not know, I was not there and, therefore, I am not a good witness as to what other liquidated claims were outstanding and whether one could get the Iranians to agree rapidly to settle-out those claims. You must remember the United States Government's thinking with respect to the roughly $8 billion dollars of Iranian assets. Those assets were being held outside the United States and in the New York Federal Reserve. We had very serious doubts whether we could ever really lay our hands on the assets held overseas. We had blocked the assets, and that could be used as a bargaining chip. That is different from whether, if it ever came down to the final tussle, we could use those assets to pay off debts. In that sense it seems to me there may likely be a difference between "blocking" and "vesting." The chances of being able to vest those assets and use them to pay off claims was, in the minds of many people, very, very doubtful. Therefore, we wanted to use the assets quickly and usefully to clear out a certain portion of the debt owed.

Lawrence Newman: The syndicated loans involved a lot of non-American banks. One of the things that troubles the non-bank claimants is that a preference was given to loans involving foreign banks over other loans of American banks and, indeed, over the non-bank claimants. After all, this was an Iran-United States settlement. Was any thought given to the somewhat anomalous fact that German, Japanese, or French banks would get paid off as a byproduct of this whole process?

Robert Mundheim: Yes. The short answer is that a lot of thought was given to it.

Lawrence Newman: Didn't that seem somewhat anomalous, since these foreign banks did not even want the freeze or the claims of repudiation to begin with?

Soia Mentschikoff: I thought you said the overseas deposits were all subject to setoff by the banks in which the deposits lay. An interesting fact, if true.

Robert Mundheim: Again, it was not clear whether all of it was. There were unresolved legal questions as to whether those setoffs would ultimately be recognized.

Charles Brower: I preface this by saying that I have represented both banking claimants and other claimants. I would like to elaborate a little bit on what Bob said. Not only was there a genuine question whether or not the long arm of the Foreign Assets Control Regulations[11] would be upheld in London and Paris, at least some of the banks had also asserted and would continue to assert enormous set offs. For that reason, they were in fact in a far better position from the outset than most other claimants. I was not really privy to the discussions regarding the overseas bank branches, but I do know that one of the serious problems with regard to the syndicated loans was the so-called "black hole" problem, whereby the syndicate agent was obligated under most, if not all, of the agreements to pay out proportionally to the members of the syndicate anything he got his hands on. So, if the agent only got part of the full setoff he was trying to assert on behalf of the syndicate, he would get into an enormous tangle. I suspect that that kind of consideration—the need for tidiness—was one element in the consideration of fairness. The short answer generally given as to why the banks were preferred is that they were in a preferred position in the first place, and, under the circumstances, a constitutionally legitimate distinction could be made among these different categories of claims.

Soia Mentschikoff: But the non-bank claimants' attachments were in place and a bank setoff has no priority against prior attachments.

Robert Mundheim: I hasten to remind you of one thing. Ultimately the Iranians said, "That's the deal we want to do." That was on January 15. There was not a lot of turnaround time because of the real deadline of January 20th.

Hans Smit: Why?

Robert Mundheim: Why was there a real deadline? Because I do not think anybody would have been sufficiently bold to say that the Reagan Administration would pick up the negotiations and carry them through. Nor is it clear that without the deadline the Iranians would have been moved to negotiate and to conclude a settlement in a short period of time. After all, as Mark Feldman said, there were

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11. 31 C.F.R. § 535 (1980), as amended, 46 Fed. Reg. 14,330 (1981) [for text, see *infra* Appendix at 141, 164, 172 and 175].

numerous times in the course of more than a year when things seemed to be coming together. Then they would break apart. The existence of the deadline seemed to me a very important discipline in settling the affair.

Cynthia Lichtenstein: I want to clarify Bob Mundheim's remark that there were considerable doubts as to the ability of the Government to actually put its hands on the offshore deposits. Did you say that because the International Economic Emergency Powers Act (IEEPA)[12] does not provide for vesting, or did you say that because you were not certain of the authority of the freeze over dollar deposits in a French branch of a U.S. bank, such as Citibank's French offices? A lot of those deposits were booked with bank offices opened in France and subject to French banking regulations. There was a real extraterritorial effects problem.

Robert Mundheim: I think that there was no doubt in our minds that IEEPA gave the President and the Secretary of the Treasury power to implement the freeze. It does not, however, authorize vesting. Under U.S. law, congressional action would be necessary to accomplish that. Yet, the ultimate issue was not one that was going to be decided by the United States Supreme Court. It was going to be decided by, perhaps, the House of Lords in the United Kingdom or by the French courts in the French litigation. Now, I have stated that there may be a difference between a freeze and vesting. If you are talking about taking the funds and paying them out to American claimants, you also have to say that a French court and a British court would support that right. I am not an international lawyer, so I do not have an expert opinion on that. But certainly, as one listened to the various experts in that area, one had to question very seriously whether the United States position would ultimately prevail.

Hans Smit: Now, of course, whether the freeze order would be upheld by the French or English courts did not depend exclusively on whether those courts would be prepared to give extraterritorial effect to that order. The banks had another argument; namely, that the contracts under which the funds were deposited contemplated, as part of the agreement, the application of American law to the disbursement of the funds. So it was not necessary to give extraterritorial effect to the freeze order because the contract itself contemplated that the funds would be channeled through New York and paid out. At that point, it was only necessary to give a *territorial* effect to the freeze order. So there was a two-pronged argument in that situation.

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12. 50 U.S.C. §§ 1701-1706 (1978) [for text, see *infra* Appendix at 206].

Robert Mundheim: You are right, that argument could be made and certainly the way the Eurocurrency market works gives support to your argument. Transfers from Eurodollar accounts are made, in the last analysis, by transfers in dollar accounts held by U.S. banks with the Federal Reserve. Basically, all dollars have their home in the United States. But, as you just said, that is an argument, and the question is whether that argument would be taken as permitting the freeze to be recognized in, say, London. The people who were saying that they had doubts were fully aware of the argument you just made.

Hans Smit: Of course, politically it would be easier for an English or a French court to say, "We will just hold the parties bound to the terms of their contract," than to say, "We give extraterritorial effect to an American freeze order."

Robert Mundheim: Yes, and also there were some significant precedents under British law which suggested that that is precisely what the British courts would do.

Frank Mayer: I wanted to make a couple of comments. One, to clarify Soia Mentschikoff's question about attachments in England; there were none and, under English law, my understanding is there could be none, so there were no London deposits attached. There were some so-called "Mareva"[13] injunctions prohibiting certain banks from transferring Iranian assets that were subsequently lifted, as I recall. It was quite different from the situation in the United States. The second comment I would like to make concerns the non-syndicated bank debt, and the separate $1.4 billion pool established in part to settle those debts. The Iranian negotiating attitude—that these obligations differed from the other claims—does have some ground in common sense. A bank loan is very rarely subject to any kind of counterclaim or setoff. It is logical that the Iranians viewed a liquidated bank debt as quite different from what an American company might view as a liquidated commercial debt (*e.g.*, where a company is owed money as a result of selling goods). The Iranians might say the goods were defective, and then you would have the whole problem of setoffs and counterclaims running from the other side which, if you just viewed the case from the American perspective, you might overlook. So the Iranians were apparently unwilling, for this reason as well as for the reason that the banks with their large deposits were in a stronger bargaining position, to provide the same funding security to non-bank claimants.

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13. *Mareva v. Int'l Bulkcarriers* [1975] 2 Lloyd's Rep. 509.

Stefan Riesenfeld: The point Frank Mayer made is also my point. You have to be very careful. The laws of these various countries—France, England, Germany—are totally different. Not only is the law of attachment different—you only have the so-called "Mareva" injunction in England—but the setoff question is quite different. With all due respects, Soia, a setoff may have priority over an attachment in those foreign countries. It raises really very complicated foreign law questions and I well understand that you could not wait until those questions were decided.

Lawrence Newman: If there could be setoffs under New York law, and I gather there would be if, as Hans Smit suggests, these are contracts to which United States law applies, then why were the attachments which had been made against those banks not also considered applicable to the overseas deposits?

Robert Mundheim: Please state your question again.

Lawrence Newman: The banks were saying in England, and in the United States, as I understand it, that the New York Debtor and Creditor Law permitted setoff and gave them priority over the attachments. They were also saying that U.S. law—the freeze—applies for a variety of reasons; that these were really New York-oriented contracts. There were many attachments in New York against Citibank, Chase, and all others with deposits overseas. Why, then, were the attachments not also in effect as to those deposits?

John Westberg: What happens when the bank answers the attachment order with "No Funds"? If the bank, on the one hand, answers the attachment order with "No Funds," but in Europe argues that the funds were subject to the jurisdiction of the United States, there may be a conflict.

Robert Mundheim: That question has not been answered yet. I think they are hoping they do not have to answer it.

Mark Feldman: I do not know what the answer is. The Justice Department has advised us that attachments do not run beyond the jurisdiction of the court. They take a different view of injunctions, which has caused a difference in the strategy of our response to some of the applications for relief by claimants. However, I am not sure that there is an inconsistency. The argument that the banks might have made, had it gone that far, is that the British court should not order the bank to do something which had to be performed in part in the United States where that part would violate U.S. law. I am not sure that that is the other side of the coin.

Robert Mundheim: In any event, if the freeze was not recognized, the banks were still prepared to argue their setoffs in the British courts, the French courts, and the German courts.

Cynthia Lichenstein: I think I can help clarify. When speaking about attachments of deposits you are dealing with property of the attachment debtor, which is Iran, in the hands of a third party, the bank, and the question is, what is the *situs* of the property? Thus, the banks can argue for purposes of not recognizing an attachment which was issued by a New York court that the situs of the debt owed (*i.e.*, the deposit account) by Citibank's French office or its London branch is in France or in England and that the property right was in England or in France for that purpose. Simultaneously, they can argue that the U.S. Government freeze order should be given effect by the foreign court insofar as their obligation to repay Iran is concerned because the parties to the deposit agreement have determined that New York law should be applicable or because ultimately the transfer will have to take place on the books in New York. These are two totally separate arguments. So they can happily reply "No Funds;" there are no funds booked here in the United States.

Robert Mundheim: I'm reassured.

The Settlement of Claims Through Arbitration

Alan Swan: I think what we shall do now is go back to Mark Feldman for some comments regarding the development of the arbitral tribunal[14] as one way of resolving the claims problem.

Mark Feldman: Just for purposes of structuring some of the presentation, I will try to talk about the arbitration process itself. Much of this has yet to unfold and I can really use such advice as you may want to give to me. We are just feeling our way. Later on we can talk about the domestic litigation implications of these agreements.

One thing I would like to say by way of background is that from the outset of the negotiations, when the Iranians called for the return of their assets, the U.S. Government took the position that because of the judicial attachments we could not return those assets without Iran's agreement to an effective claims settlement process.

The Iranians first floated the idea of arbitration. I cannot say exactly how it came up in the negotiations with the Algerians because I was not involved intimately in the early stages of it. But there had

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14. This tribunal is established by the Claims Settlement Agreement *supra* note 1, at art. II.